Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.-76-443

WILLIAM R. WESSON, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se

Joined By

JOHN CHARLES VAIANI, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se

-v.-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Defendants-Appellees,

-and-

MISSOURI PACIFIC RAILROAD COMPANY

Intervening Defendant-Appellee

APPELLANTS' REPLY BRIEF

To Motion of Missouri Pacific Railroad Company to Affirm

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A study of Appellee MOPAC'S Motion to Affirm reveals that it does not reply to the Constitutional issue raised under the Fifth Amendment by dissident stockholder Appellants in this instant recapitalization which reduces MOPAC Class B stockholder equity by more than 61%. Appellee avoids and omits any discussion of *Wood* v. *United States* 132 F. Supp. 586 cited by Appellants'.

Appellee instead delivers a diatribe deprecating the significance of book value in this huge transfer of property from the Class B common equity bearing stockholder to the Class A $5 preference stockholder.

QUESTION PRESENTED IS SUBSTANTIAL

The taking of 61% or more equity from Class B stockholders and giving it to Class A stockholders in this instant MOPAC recapitalization is clearly unconstitutional as to dissident stockholders although there was an affirming vote. *Wood supra* (See J.S. F-18 and F-19)

Also the jurisdiction of this Honorable Court is affirmed in *Wood supra* at page 586. "Questions affecting constitutional powers and statutory authority can be raised on a resort to the courts to review an order of the Interstate Commerce Commission, and these are legal questions which do not involve any invasion of Commission's exclusive jurisdiction over matters which call for technical knowledge pertaining to transportation."

In *Wood supra* page 595 the Court is concerned that "stock will receive securities 'at least equal' to the value of those surrendered."

FACT AND LAW NOT DETERMINED IN COURTS BELOW

In his evaluation of the settlement which resulted in this instant recapitalization, Judge Edward J. Weinfeld in the U.S. District Court, Southern District of New York, set a standard which was followed through all the litigation in New York, in the ICC, in Missouri, and in New Jersey leading up to this appeal to the U.S. Supreme Court, when he wrote, "The Court's role is a more 'delicate one,' which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MOPAC." *Levin* v. *Mississippi River Corporation* 59 FRD 353 (1973) at 361. Therefore, Judge Weinfeld failed to make meticulous findings of facts

and law as alleged on page 8 of Appellee's motion, because it was his stated intention not to. In order to find the facts as required by Rule 52 of the Rules of Civil Procedure, Judge Weinfeld would have had to order the property evaluated.

IMPORTANCE OF DETERMINING EQUITY VALUES

Using the Webster definition, equity is "the amount of value of property or properties above the total of liens or charges." Railroads by their nature are capital intensive industry. Their land holdings and properties tend to appreciate very rapidly in time of accelerated inflation as has been the case over the past 20 years since the MOPAC Reorganization in 1955. Consequently, a current evaluation is of prime importance in determining what each stockholder is putting into the recapitalization plan. The figures used by MOPAC to determine the share of the railroad owned by the Class B Common equity bearing stockholders on December 31, 1972, were based on 1955 property values in which case Class B owned 65.5% of the equity account before recapitalization. If the 1955 property values are doubled for the sake of argument to recognize inflation, then Class B owned 82.8% of the equity account before recapitalization. It matters not whether we refer to this as the equity account, book value, locomotives and tracks, or apples and oranges; if Class B owns 82.8% of it before recapitalization, then Class B must own 82.8% of it after recapitalization according to *Schwabacher* v *United States* 334 U.S.182 (1948) and *Wood supra*. The MOPAC Charter defines what Class B owns, ie all residuary values after $100 to Class A, but it is the *current evaluation of the property* which tells the Class B stockholder the value of what the Charter says he owns.

Consequently, the recapitalization can not be carried out legally under the Fifth Amendment to the Constitution and the above cited cases without an evaluation under Section 19a of the Interstate Commerce Act (49 USC 19a) in order to

establish what Class B Appellants contributed to the recapitalization.

The *"immutable"* aspect of the contract in the 1956 Agreed Plan of Reorganization pertains to *what* the Class B stockholder owns under the MOPAC charter, not its value. Value must be determined currently at the time of a recapitalization. Judge Learned Hand's sage observations on book value, actual value, market value, earnings, etc., as quoted on Page 20 of Appellee's motion must be interpreted. Judge Hand says that book value does not measure actual value. When measuring actual value, stock market value can *not* be used; for it is illusive. Was Penn-Central worth a stock market value of $87 per share on the eve of bankruptcy when it already had a negative working capital position, or is it worth a stock market value of $1 per share after the bankruptcy, where it is now trading?

Actual value can only be determined through a 49 USC 19a evaluation. The percentage of the Class B ownership can then be determined; and if Class B puts a given percentage of the railroad into a recapitalization, it must take the same percentage out, *not* 61% less.

VOTING OF ALLEGHANY SHARES IN VIOLATION OF SECTION 5(4) OF INTERSTATE COMMERCE COMMISSION ACT

Contrary to Appellee's contention that voting by the trustee was proper, the voting of Alleghany shares by SAF Co., nominee for the trustee, Franklin National Bank was a violation of Section 5(4) of the ICC Act because Alleghany was in control of Jones Motor. Section 5(4) follows in part:

> "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of a subparagraph (a) thereof, or to accomplish or

effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a *voting trust or trusts*, or in any other manner whatsoever." (Emphasis supplied)

Hence, there was not a majority vote by the Class B shareholders when Alleghany's 21,234 shares of the total 39,731 shares is eliminated.

NATURE OF THE CLASS ACTION

Appellee's Motion omits the nature of the class action from the reprinted Orders of Judge Frederick van Pelt Bryan on pages 56a through 58a.

"This action was commenced by Betty Levin on December 29, 1967. Alleghany Corporation and Robert LeVasseur subsequently were, upon their motions, permitted to intervene as additional plaintiffs.

"The complaints filed by all three plaintiffs charge, in substance, that dividends declared and paid by the MoPac board of directors on the Class B stock have been and are unreasonably and unjustifiably low; that Mississippi has misused its voting control over MoPac's board of directors in furtherance of a plan and conspiracy with said directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B stockholders; and that such conduct will continue unless enjoined by the Court. The complaints ask the Court to direct MoPac to pay reasonable dividends for past years to all Class B stockholders, plus interest thereon; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and that plaintiffs be awarded their costs, expenses and

reasonable counsel fees incurred in prosecuting this action. In addition to these claims on behalf of the class, plaintiffs Levin and LeVasseur also assert derivative claims on behalf of Mopac."

Hence, the action was started based on dividends and conspiracy, with no interveners after December 2, 1968, but was convoluted into a recapitalization without recapitalization ever being mentioned in the pleadings. The 61% or more of property rights lost were never in jeopardy under the original statement and intent of Judge Bryan's Order but became jeopardized by a settlement agreement which was signed only by the corporate giants involved, Alleghany, Missouri Pacific Railroad, and Mississippi River Corporation. The minority stockholders, Levin and LeVasseur, were not signators to the settlement agreement.

CONCLUSION

Appellant's prayer remains for a due process evaluation of the property so they may receive from the recapitalization plan the exact amount of equity they contributed in the form of Common Stock and *not cash* as implied on page 18 of Appellee's motion.

Respectfully submitted,

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